IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Anthony Piccirilli et al.

Serial No.   10/750,009

Filing Date: December 30, 2003

Examiner: Viet Duy Vu

Art Unit: 2154

Confirmation No.:   9321

Title: SYSTEM AND METHOD FOR MEASURING
MIDDLEWARE RESPONSE TIME

Mail Stop AF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

The following Pre-Appeal Brief Request for Review ("Request") is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005 ("OG Notice"). Pursuant to the OG Notice, this Request is being filed concurrently with a Notice of Appeal. Applicants respectfully request reconsideration of the application in light of the remarks set forth below.

REMARKS

In the Final Office Action mailed August 14, 2007 (the "Final Office Action") Claims 1-9 were pending, of which, Claims 1-3 and 5-9 were rejected. Applicants contend that the rejections of Claims 1-3 and 5-7 contain clear legal and factual deficiencies, as described below. Applicants do not seek review in this Request of the rejections of Claims 8 and 9. Applicants request a finding that the rejections of Claims 1-3 and 5-7 are improper, and that the Claims are allowable.

Section 102 Rejections

The Final Office Action rejects Claims 1-3 and 5-7 under 35 U.S.C. § 102(e) as being anticipated by U.S. Pat. No. 6,885,641 to Chan et al. (*"Chan"*). Applicants respectfully traverse these rejections for the reasons stated below.

Claim 1 is directed to a method for monitoring middleware performance wherein a route time is determined for a message transmitted along a predetermined network route and at least one queue residency time is determined. The at least one queue residency time reflects an amount of time that at least one other message is stored in at least one respective queue located along the predetermined network route. In further accordance with the method, a middleware response time is calculated according to the route time and the at least one queue residency time. *Chan* does not disclose each of these limitations.

For example, Claim 1 requires, "determining a route time for a message transmitted along a **predetermined** network route." In the Office Action mailed March 27, 2007 ("Office Action"), the Examiner contended that *Chan* discloses these limitations and supported his rejection of Claim 1 by pointing to sections of *Chan* which recite, "[n]etwork response time has three components: latency (which includes propagation delay and network device processing delays) . . . ." See Office Action, page 2 (citing *Chan*, col. 22, lines 29-34). Applicants respectfully contend that the cited portions of *Chan* do not support the Examiner's rejection because, among other things, merely reciting "latency" as a component of "[n]etwork response time" does not disclose "determining a route time for a message transmitted along a **predetermined** network route" as required by Claim 1. Moreover, *Chan* directly recites, "the preferred embodiments treat the entire system of end processors and the

network connecting them as a black box singular entity, providing a testing methodology and mathematical analysis of for the entire system." See *Chan*, col. 6 lines 29-33. Applicants respectfully contend that "treat[ing] the entire system of end processors and the network connecting them as a black box singular entity" does not disclose "determining a route time for a message transmitted along a **predetermined** network route" as required by Claim 1.

In the Final Office Action, the Examiner argued that "Chan's disclosure of a pair of predetermined source and destination stations meets the limitation of a predetermined network route." *See* Final Office Action, page 3. This is patently false. Simply knowing a source and a destination does not disclose, teach, or suggest knowing the "predetermined network route."
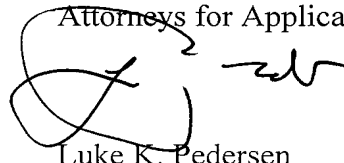
Accordingly, Applicants contend that Claim 1 and all claims depending either directly or indirectly from Claim 1 (i.e., Claims 2-7) are in condition for allowance.

CONCLUSION

As the rejections of Claims 1-3 and 5-7 contain clear legal and factual deficiencies, Applicants respectfully request a finding of allowance of Claims 1-3 and 5-7. If the PTO determines that an interview is appropriate, Applicants would appreciate the opportunity to participate in such an interview. To the extent necessary, the Commissioner is hereby authorized to charge any required fees or credit any overpayments to Deposit Account No. **02-0384** of **Baker Botts L.L.P.**

Respectfully submitted,

BAKER BOTTS L.L.P.
Attorneys for Applicants

Luke K. Pedersen
Reg. No. 45,003
PHONE: (214) 953-6655

Date: _____9/17/07_____

CORRESPONDENCE ADDRESS:

Customer Number: **05073**